

# Litigation

Recent Litigation in California Water Management, <i>California Department of Water Resources, Office of the Chief Counsel</i> .....	3
--	---



# Recent Litigation in California Water Management

*By California Department of Water Resources, Office of the Chief Counsel*

## ***Planning and Conservation League, Plumas County, and Santa Barbara Citizens Planning Association of Santa Barbara County v. Department of Water Resources and Central Coast Water Authority***

The Planning and Conservation League filed a lawsuit on December 27, 1995, against the Department and Central Coast Water Authority, challenging the California Environmental Quality Act compliance for the Monterey Amendment. PCL amended the complaint February 13, 1996, alleging that the Department could not legally transfer the Kern Water Bank to Kern County Water Agency as part of the Monterey Amendment.

After a hearing held May 17, 1996, a Sacramento County Superior Court judge ruled in favor of the Department and CCWA on PCL's complaint and dismissed the lawsuit. PCL appealed the decision to the Third District Court of Appeal. On September 15, 2000, the Court of Appeal held that EIR was inadequate and that the Department should have acted as lead agency for the project. In addition, the Court of Appeal reversed the Superior Court's entry of summary judgment and reinstated the validation claim in the complaint, providing a forum for review of the entire Monterey Amendment and, in particular, the transfer of the Kern Fan Element of KWB.

In its decision, the Court of Appeal held the EIR was inadequate because the document should have included an analysis of Article 18(b), a standard term in the long-term water supply contracts, as part of its 'no project alternative' analysis. Article 18(b) authorized the Department to declare a permanent shortage and reduce all contractors' allocations across the board, thereby avoiding the agricultural shortage provisions. The Department believed that it was very unlikely that Article 18(b) would ever be invoked and, therefore, the elimination of Article 18(b) did not require a 'no project alternative' analysis.

The Court of Appeal adopted PCL's reasoning that local planners rely on allocation amounts in the contracts and that reductions would affect local land use planning decisions. Accordingly, the Court held that both the elimination and possible invocation of Article 18(b) needed to be evaluated for environmental impacts, and the EIR was inadequate for failure to do so. The Court directed the Department to prepare a new EIR and remanded the matter to the trial court to vacate the Department's certification of the EIR and make such other orders as appropriate.

On December 13, 2000, the California Supreme Court denied review. The parties commenced mediation on March 26, 2002, and proceedings in Superior Court were stayed pending completion of mediation. On July 18, 2002, the parties reached agreement on principles for settling the lawsuit. The Department commenced preparing a new EIR and the interested parties continued mediation to convert the settlement principles into a legal agreement. The final settlement agreement is being prepared for execution and submittal to the Superior Court for approval.

***Coordinated Special Proceedings, State Water Resources Control Board Cases***

On March 15, 2000, SWRCB adopted Water Rights Decision 1641, which implemented certain water quality objectives in the May 1995 Water Quality Control Plan for the Sacramento-San Joaquin Bay Delta Estuary on a long-term basis. D-1641 did not implement the Delta outflow objectives in the 1995 Plan. Those objectives were to be addressed in a subsequent water rights hearing. D-1641 also approved the joint point of diversion which allowed interchangeable use of SWP and CVP pumping facilities under certain conditions. It also approved modification of the petition to modify the place and purpose of use in the CVP permits subject to condition.

Eleven different lawsuits across the State were filed in 2000 challenging D-1641, including five in which the Department was named as a real party in interest. These lawsuits were all coordinated into one special proceeding in Sacramento Superior Court.

The case will address several important legal questions, including whether D-1641 complied with CEQA, whether the changes in D-1641 injured certain Delta water users, and whether D-1641 was consistent with area of origin laws.

The Department is supportive of D-1641 and is working in cooperation with SWRCB. The trial commenced in August 2002 and extended 16 days. The trial was completed on November 15, 2002. A decision is expected in 2003. The case is currently on appeal.

***El Dorado Irrigation District v. State Water Resources Control Board***

This litigation involves SWRCB Decision 1635, which approved the application by El Dorado Irrigation District to divert water for urban purposes based on the assignment of a “state filing.” “State filings” are water rights filings made by the Department (or the Department of Finance prior to 1956) as part of a general plan for State water development.

Two separate lawsuits were filed and consolidated in this case. The first lawsuit was filed by El Dorado Irrigation District and El Dorado County Water Agency, which challenged the imposition of Term 91 as part of the decision. Term 91 is a standard permit term that prohibits diverters within the Sacramento-San Joaquin watershed from diverting natural flow during the time periods that the SWP and CVP are releasing stored water to meet the Delta’s water quality objectives. The second lawsuit was filed by an environmental group, League to Save Sierra Lakes. This lawsuit alleges that SWRCB failed to comply with CEQA and improperly allocated water for urban purposes contrary to the Water Code and the public trust doctrine. The Department was not named originally in either lawsuit, but was later ruled to be indispensable party for the El Dorado litigation as a result of a motion brought by SWRCB. Consequently, the Department was later named as a party in the lawsuit in an amended petition.

If the court finds that Term 91 was improperly imposed on El Dorado as part of D-1635, the Department will be required to adjust its operations accordingly to compensate, which would affect SWP water supply. The litigation is expected to go to trial in 2003. This case is currently on appeal.

***Tulare Lake Basin Water Storage District v. U.S.***

In February 1998, plaintiffs Tulare, Kern, Wheeler Ridge-Maricopa Water Storage District, and others filed a claim in the U.S. Court of Federal Claims alleging that the federal government took plaintiffs' water without just compensation in violation of the Fifth Amendment of the U.S. Constitution. The plaintiffs claim that in 1992, 1993, and 1994 the U.S. Fish and Wildlife Service and National Marine Fisheries Service, under authority of the Endangered Species Act and through issuance of biological opinions for winter run salmon and Delta smelt, took their water for a public purpose without compensation. The plaintiffs claim a right to the water based on their long-term water supply contracts with the Department. The plaintiffs claimed damages of \$25,720,320 plus attorney fees and other costs.

On April 30, 2001, the U.S. Court of Federal Claims issued a decision regarding liability, but not the amount of compensation, for the Constitutional takings claim. The Court held that the federal government has authority to protect winter-run Chinook salmon and Delta smelt under ESA, but that it must pay the costs of this protection to water users who would have received that water from the SWP. The trial to determine the amount of compensation to be paid was held in July 2002. The Court's final decision is expected in late 2003 or early 2004.